

**New York Life Ins. Co. v Miller**

2023 NY Slip Op 33745(U)

October 12, 2023

Supreme Court, New York County

Docket Number: Index No. 653538/2022

Judge: Lyle E. Frank

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. LYLE E. FRANK **PART** **11M**

*Justice*

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NEW YORK LIFE INSURANCE COMPANY,  
Plaintiff,

**INDEX NO.** 653538/2022

**MOTION DATE** 06/22/2023

**MOTION SEQ. NO.** 001

- v -

DAWN B MILLER, JOHN S RAND, JENNIFER RAND  
Defendant.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50 were read on this motion to/for DISMISSAL.

This action arises out of a dispute over a decedent’s bank account held with New York Life Insurance Company. New York Life Insurance Company commenced this action in order to resolve the dispute as to ownership over this account, naming as Co-Defendants decedent’s wife Dawn Miller (“Dawn”) and decedent’s daughter and son in law from his previous marriage, respectively, Jennifer Rand and John Rand (“The Rands”).<sup>1</sup> Dawn filed cross claims against the Rands for breach of their fiduciary duty. In response, the Rands filed a motion to dismiss Dawn’s cross claims. Dawn then opposed and filed a cross motion to disqualify the Rand’s counsel, Gary E. Bashian, Esq.

Factual Background

On May 4, 2006, decedent Henry G. Miller (“decedent”) opened a bank account with New York Life Insurance Company. The account listed decedent’s wife, Dawn Miller, as joint

<sup>1</sup> The Court would like to thank Alyson Bass, Esq. for her assistance in this matter.

tenant with rights of survivorship. NYSCEF Doc. No. 1, page 2. Prior to marriage, the parties executed a prenuptial agreement, in which Dawn disclaimed all rights to the estate. In 2020, Henry Miller passed away, and thereafter Dawn sought disbursement of the contents of the bank account from New York Life Insurance. The Rands, as co-executors of decedent's estate, intervened to stop the disbursement to Dawn. The Rands alleged the account was established "for convenience" and therefore is property of the estate, precluding Dawn from claiming the contents of the account. In order to resolve ownership over the account, New York Life Insurance Company commenced this action.

### Standard of Review

When considering a motion to dismiss based upon CPLR § 3211(a)(7), the court must accept the alleged facts as true, accord the plaintiff the benefit of every possible favorable inference, and determine whether the facts alleged fit into any cognizable legal theory. *Leon v. Martinez*, 84 NY2d 83 [1994]. On a motion to dismiss the court "merely examines the adequacy of the pleadings", the court "accept as true each and every allegation made by plaintiff and limit our inquiry to the legal sufficiency of plaintiff's claim." *Davis v Boenheim*, 24 NY3d 262, 268 (internal citations omitted).

### Discussion

#### i. Breach of Fiduciary Duty

To state a claim for breach of fiduciary duty, plaintiffs must allege that (1) defendant owed them a fiduciary duty, (2) defendant committed misconduct, and (3) they suffered damages

caused by that misconduct. *Burry v. Madison Park Owner LLC*, 84 AD3d 699, 700 [1st Dept 2011].

The Rands allege Dawn's claim for breach of fiduciary duty must be dismissed because first, Dawn is alleging acts of wrongdoing which occurred prior to decedent's death, and thus the Rands were not yet fiduciaries of the estate, and second, because Dawn is not a beneficiary under the will pursuant to the prenuptial agreement. In opposition, Dawn contends that as she was left certain personal property in decedent's will, she is a beneficiary of the estate and thus the Rands owe her a fiduciary duty as co-executors of the will.

Dawn alleges the Rands breached their fiduciary duty by "exerting undue influence over the defendant." However, Dawn has sued the Rands solely in their capacity as executors of the will and not in their individual capacity. Dawn's allegation that the Rands exerted undue influence over the defendant would by definition have to have occurred while decedent was alive, at which point the Rands would not have been executors of the will yet. Therefore, this aspect of Dawn's cross claim for breach of fiduciary duty is dismissed.

Next, as it pertains to Dawn's claim that the Rands are in breach of their fiduciary duty to her by allegedly interfering with her access to the New York Life Insurance bank account, again turns on whether the Rands owed Dawn a duty. Pursuant to the Surrogate Court decision, because of the prenuptial agreement between Dawn and the Decedent, Dawn's takings under the will are limited to the specific gifts bequeathed to her. While Dawn is correct that she is a beneficiary with regard to these specific gifts, it does not follow that the Rands owe her a fiduciary duty with respect to the rest of the will, to which she is not a beneficiary. Therefore, the Court finds Dawn's cross claim for breach of fiduciary duty is dismissed.

ii. Constructive trust

In order to make a claim for a constructive trust, a party must establish the existence of a confidential or fiduciary relationship, a promise, express or implied, a transfer made in reliance on that promise, and unjust enrichment. *Bankers Sec. Life Ins. Soc'y v. Shakerdge*, 49 NY2d 939, 940 [1980].

For the same reasons above the Court finds that Dawn and the Rands do not have a fiduciary relationship as it pertains to the New York Life Insurance account. Because there is no fiduciary relationship between the parties, Dawn has failed to plead one of the elements necessary for a constructive trust. Therefore, Dawn's claim for a constructive trust is dismissed.

iii. Dismissal of Counsel

Finally, Dawn moves for the dismissal of the Rands counsel, Mr. Bashian, Esq. Dawn argues the intention of the decedent, was that prior to his death, the balance of the New York Life Insurance account be placed into a trust for the benefit of their daughter, Anna. Dawn alleges this desire was communicated to Mr. Bashian, decedent's attorney at the time of his death, who now represents the Rands. Dawn further alleges at the direction of decedent, the trust instrument was drafted by Mr. Bashian, but for reasons unknown to Dawn, the trust was not created. In Mr. Bashian's affidavit he states he has no personal knowledge regarding the creation of the account and decedent's donative intentions regarding the account.

The party seeking disqualification of a law firm, or an attorney bears the burden of making a clear showing that disqualification is warranted. *HoganWillig, PLLC v. Swormville*

Fire Co., Inc 210 AD3d 1369 [4th Dept 2022] (internal citations omitted). A movant seeking disqualification of an opponent’s counsel bears a heavy burden. *Mayers v. Stone Castle Partners, LLC*, 126 AD3d 1, 5 [1<sup>st</sup> Dept 2015] (internal citations omitted). A party has a right to be represented by counsel of its choice, and any restrictions on that right must be carefully scrutinized. *Id.*

Here, the Court finds that Dawn has not made the requisite showing that disqualification of Mr. Bashian is necessary. While Mr. Bashian may have information relating to the failure to create the trust as Dawn alleges, this is not relevant to the issue of ownership of the account. Here the issue for the Court is the ownership of the New York Life Insurance account, and because the trust was never created, it has no bearing on this issue. As Mr. Bashian only admits to knowledge as to discussions regarding the potential creation of the trust and denies any knowledge as the donative intent of the account, plaintiff has not made a clear showing of the need for disqualification. Therefore, plaintiff’s cross motion to disqualify Mr. Bashian is denied. Accordingly, it is hereby

ORDERED that Defendants Jennifer Rand and John S. Rand’s motion to dismiss plaintiff’s cross claims is granted; and it is further.

ADJUDGED that Defendant Dawn Miller’s cross motion to disqualify Co-Defendants’ counsel is denied.

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LYLE E. FRANK, J.S.C.

10/12/2023  
DATE

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER

REFERENCE